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Employment Discrimination—Business Necessity and BFOQ Exceptions to Title VII Extended to Unmarried, Pregnant Youth Services Workers Serving as Role Models. Chambers v. Omaha Girls Club, Inc., 834 F.2d 697 (8th Cir. 1987).

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EMPLOYMENT DISCRIMINATION—BUSINESS NECESSITY AND BFOQ EXCEPTIONS TO TITLE VII EXTENDED TO UNMARRIED, PREGNANT YOUTH SERVICES WORKERS SERVING AS ROLE MODELS. *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987).

The Omaha Girls Club (OGC) is a private club organized to help girls ages 8 to 18 "maximize their life opportunities."[1] One of OGC's goals is pregnancy prevention, because it sees pregnancy as limiting the opportunities for its young members. OGC emphasizes the development of close relationships between staff and members and trains its staff to act as role models for its members as a means of fulfilling its mission. Pursuant to this approach, OGC adopted a "role model rule" forbidding single parent pregnancies among its staff members.[2]

Crystal Chambers, a single black woman, worked as an arts and crafts instructor at the North Girls Club, a facility of OGC.[3] She was discharged for violation of OGC's "role model rule" when she became pregnant. Chambers challenged the firing for her unmarried pregnancy by filing suit in federal district court in Nebraska.[4] She brought suit under several theories, including violation of title VII of the Civil Rights Act of 1964, as amended.[5] Except for the title VII claim based

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1. Chambers v. Omaha Girls Club, Inc., 834 F.2d 697, 698 (8th Cir. 1987).

2. The OGC's personnel policies state:

> MAJOR CLUB RULES
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> All persons employed by the Girls Club of Omaha are subject to the rules and regulations as established by the Board of Directors. The following are not permitted and such acts may result in immediate discharge:
>
> * * * * * *
>
> 11. Negative role modeling for Girls Club Members to include such things as single parent pregnancies.

Id. at 699 n.2.

3. An *amicus curiae* brief for the plaintiff/appellant points out that Chambers' employment with OGC was only part time. Brief of The Sisterhood of Black Single Mothers, The American Civil Liberties Union, The Nebraska Civil Liberties Union, and The Center for Constitutional Rights as *Amici Curiae* in Support of Appellant at 1, Chambers v. Omaha Girls Club, Inc., 834 F.2d 697 (8th Cir. 1987) (No. 86-1447).

4. Chambers v. Omaha Girls Club, Inc., 629 F. Supp. 925 (D. Neb. 1986), *aff'd*, 834 F.2d 697 (8th Cir. 1987).

5. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e, 2000e-1 to -17 (1982); 5 U.S.C. §§ 2204-05 (repealed 1964)) [hereinafter title VII].

Chambers also filed claims for violations of her rights under the first, fifth, ninth, and fourteenth amendments to the Constitution and under civil rights statutes 42 U.S.C. §§ 1981, 1983, 1985, 1986, and 1988. She filed state law claims for bad faith discharge, defamation,

on sex and race discrimination, the district court dismissed all her claims before trial or at the end of her case in chief. The court ruled against Chambers on the title VII claim after a full trial.[6]

The court found that the title VII claim presented a prima facie case of combined race and sex discrimination under both the disparate treatment[7] and disparate impact[8] theories of recovery.[9] However, it further found that OGC successfully rebutted Chambers' case under both theories, articulating a legitimate, nondiscriminatory reason for discharging her under the former theory[10] and proving a business necessity for the role model rule with respect to the latter.[11]

On appeal, Chambers contended that OGC based the role model rule upon its own speculation and presented no validation studies to show that the rule prevented pregnancies among OGC's members.[12] She also argued that the court should not have applied disparate treatment analysis to her case because discharge on account of pregnancy, without further analysis, constitutes intentional sex discrimination.[13] Finally, she argued the role model rule could not be justified as a bona fide occupational qualification (bfoq) which would bring it within the statutory exception for intentional discrimination.[14]

The United States Court of Appeals for the Eighth Circuit affirmed the district court's factual findings as not clearly erroneous.[15]

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invasion of privacy, intentional infliction of emotional distress, intimidation, and conspiracy to deprive her of her livelihood. Chambers v. Omaha Girls Club, Inc., 629 F. Supp. 925, 929 (D. Neb. 1986).

6. 629 F. Supp. at 951-52.

7. The disparate treatment theory of recovery applies when an employer treats some people differently from others based on race, color, religion, sex, or national origin. *See infra* text accompanying notes 22-43.

8. Disparate impact analysis applies when an employer's apparently neutral practice has a disproportionate effect upon one of the groups protected by title VII. *See infra* text accompanying notes 44-54.

9. 629 F. Supp. at 947, 949.

10. *Id.* at 947.

11. *Id.* at 950.

12. 834 F.2d at 702.

13. *Id.* at 703. The shifting burdens of proof used in disparate treatment analysis to determine whether a defendant intentionally discriminated against a plaintiff for reasons prohibited by title VII do not apply when the employment discrimination is openly based upon one of the prohibited reasons. *See infra* text accompanying notes 24-34.

14. 42 U.S.C. § 2000e-2(e)(1) (1982) provides, in relevant part:

> [I]t shall not be an unlawful employment practice for an employer to hire and employ employees, . . . on the basis of . . . religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

15. The court noted that the standard of review for business necessity determinations in

It further found that OGC's role model rule was justified as a bfoq, as well as a business necessity.[16] Chambers petitioned the court of appeals for a rehearing *en banc*. The majority of the court denied her petition with three judges dissenting.[17] *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987).

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, religion, sex, or national origin.[18] Courts have developed two major theories of discrimination under title VII—disparate treatment and disparate impact.[19] Although the theories are quite distinct in principle,[20] courts have treated them as overlapping one another in application.[21]

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disparate impact cases is the clearly erroneous standard applied to factual findings. 834 F.2d at 702 (citing Reddemann v. Minnesota Higher Educ. Coordinating Bd., 811 F.2d 1208, 1209 (8th Cir. 1987) (per curiam); Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 815 (8th Cir. 1983); FED. R. CIV. P. 52(a)).

Under the clearly erroneous standard of review an appellate court may reverse a lower court's factual findings only if the appellate court is " 'left with the definite and firm conviction that a mistake has been committed.' " *Chambers*, 834 F.2d at 702 (citing Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948))).

16. 834 F.2d at 705. Although the district court had not found the role model rule was justified as a bfoq, the appellate court found that the factual findings relevant to establishing a bfoq were the same as those supporting the finding that the rule was justified as a business necessity.

17. Chambers v. Omaha Girls Club, Inc., 840 F.2d 583 (8th Cir. 1988). Circuit Judge C. Arlen Beam, who was chief judge of the Nebraska District Court and decided the case at that level, did not participate in the vote for rehearing *en banc*.

18. 42 U.S.C. § 2000e-2a provides:

> It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

19. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1286-1394 (2d ed. 1983) [hereinafter B. SCHLEI & P. GROSSMAN (2d ed. 1983)].

20. 3 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION: RACE, RELIGION, AND NATIONAL ORIGIN § 72.10 (1987) [hereinafter 3 A. LARSON & L. LARSON]; *see also* International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977).

21. Courts often apply disparate treatment and disparate impact analysis to the same set of facts. *See, e.g.*, Jones v. International Paper Co., 720 F.2d 496, 499-500 (8th Cir. 1983). *See also* Page v. U.S. Indus., Inc., 726 F.2d 1038 (5th Cir. 1984); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 310-11 (Supp. 1985) [hereinafter B. SCHLEI & P. GROSSMAN (Supp. 1985)].

Courts apply the same standards to bfoq and business necessity defenses under the respective theories. *Compare* Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 815 (8th Cir. 1983)

Disparate treatment occurs where

> [t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.[22]

There are two types of disparate treatment cases—facial discrimination and pretext.[23] Facial discrimination involves an overtly discriminatory rule or policy by which an employer explicitly treats some employees differently from others on the basis of one of the classifications prohibited by title VII.[24] The employer's act of classifying employees on a prohibited basis establishes intent.[25] The only defense to facial discrimination is the affirmative defense of the bona fide occupational qualification (bfoq)[26] provided in section 2000e-2(e)(1) of title VII.[27]

Courts interpret the bfoq exception narrowly.[28] The Supreme Court has applied the bfoq exception to sex discrimination in only one case, *Dothard v. Rawlinson*.[29] At issue in this case was an Alabama Board of Corrections administrative regulation that prohibited women from working in positions which brought them in contact with maximum security male inmates. In holding that the exception is to be interpreted narrowly, the Court noted the requirement from a lower court decision that an employer relying on the bfoq defense must prove "that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."[30] The

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(business necessity) *with* Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1086 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980) (bfoq) (both applying "manifest relationship" standard). *See also Gunther*, 612 F.2d at 1086 n.8 (bfoq analysis "similar to and overlaps with the judicially created 'business necessity' test").

22. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

23. Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1547 (11th Cir. 1984) (citing Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection With Employment Opportunity Goals Under Title VII*, 69 GEO. L.J. 641, 673-82 (1981) [hereinafter Williams]). *See also* Note, *Title VII and Exclusionary Employment Practices: Fertile and Pregnant Women Need Not Apply*, 17 RUTGERS L.J. 95, 106 (1985).

24. *Hayes*, 726 F.2d at 1547; Williams, *supra* note 23, at 668; Note, *supra* note 23, at 106 n.61.

25. Williams, *supra* note 23, at 669 n.176; Note, *supra* note 23, at 106 n.61.

26. *Hayes*, 726 F.2d at 1547; Williams, *supra* note 23, at 668; Note, *supra* note 23, at 106.

27. 42 U.S.C. § 2000e-2(e)(1) (1982).

28. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 334 (1977); Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1085 (8th Cir. 1977) (quoting *Dothard*, 433 U.S. at 334).

29. 433 U.S. 321 (1977).

30. *Id.* at 333 (quoting Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th

Court then held that, based upon "the particular factual circumstances of this case,"[31] the regulation which excluded females from contact positions in maximum security prisons was justified as a bfoq.[32] The Court relied upon opinion testimony from both the plaintiff's and the defendant's expert witnesses to establish that, under the conditions existing in the Alabama maximum-security male penitentiaries,[33] the very sex of a female guard would diminish her ability to perform the essence of her job, which is keeping order in the prisons.[34]

The second type of disparate treatment theory applies when an employer takes some apparently neutral action, or adopts an ostensibly neutral policy, which the plaintiff alleges is a pretext for prohib-

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Cir. 1969)). Two tests with respect to ability to perform had emerged in prior case law. Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1224-25 (9th Cir. 1971) and Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 718 (7th Cir. 1969) restricted the use of the bfoq exception to sexual characteristics rather than characteristics which, to some degree, correlate with a particular sex. Both defendants restricted certain jobs to men only, based upon assumptions about the lesser strength of women. In such cases an employer must administer individualized tests to determine ability to perform. *Weeks*, 408 F.2d at 235, set out the less restrictive test quoted by the *Dothard* Court. *See* B. SCHLEI & P. GROSSMAN (2d ed. 1983), *supra* note 19, at 348.

Although it quoted a requirement for a "factual basis," the *Dothard* Court spoke in terms of probabilities. For example, the Court wrote that "[a] woman's relative ability to maintain order . . . *could* be directly reduced by her womanhood;" that while there is a "basis in fact" it is an "[*expectation*] that sex offenders . . . would be moved to [assault women] again;" and that there is a "*likelihood* that inmates would assault a woman because she was a woman . . . ." 433 U.S. at 335-36 (emphasis added). *See* Note, *Sex as a Bona Fide Occupational Qualification: Defining Title VII's Evolving Enigma, Related Litigation Problems, and the Judicial Vision of Womanhood after Dothard v. Rawlinson*, 5 WOMEN'S RTS. L. REP. 107, 134 n.229 (1979).

The Court noted that the district court held, in effect, that the challenged regulation was based on stereotyped assumptions about women's ability to perform as guards in male prisons. *Dothard*, 433 U.S. at 334. The Court was careful to point out that it did not question women's abilities as prison guards under normal conditions. *Id.* at 336 nn.23-24.

The Court found a basis for support of the regulation other than a stereotyped belief that women are unable to adequately perform prison guard duties. Rather, it found that the inevitable incidents of assault that would be triggered by a woman's sexuality would pose a threat to prison security, given the unstable conditions in the male maximum security facilities. Note, *supra* at 138 n.261.

31. *Dothard*, 433 U.S. at 334. The Court found there were "few visible deterrents to inmate assaults on women custodians." *Id.* at 336. Inmate access to guards was made easier by dormitory living arrangements. The institutions were understaffed. *Id.* An estimated 20% of the male prison population was sex offenders mixed in with the rest of the population in the dormitory facilities. *Id.* at 335.

A federal district court had held that the conditions of confinement in Alabama's prisons were characterized by "rampant violence" and a "jungle atmosphere" and were constitutionally intolerable. *Id.* at 334 (citing Pugh v. Locke, 406 F. Supp. 318, 325 (M.D. Ala. 1977).

32. *Dothard*, 433 U.S. at 336-37.

33. *Id.* at 336.

34. *Id.* In Diaz v. Pan Am. World Airways, 442 F.2d 385, 388 (5th Cir. 1971), the court set out the requirement that the bfoq applied "only when the essence of the business operation would be undermined by not hiring members of one sex exclusively." That court applied a "business necessity test, not a business convenience test." *Id.*

ited discrimination.[35] The Supreme Court has articulated the order and allocation of proof for analysis of pretext cases.[36] The plaintiff must establish a prima facie case of discrimination prohibited by title VII.[37] The burden of production then shifts to the defendant "to articulate some legitimate, nondiscriminatory reason" for its action against the plaintiff.[38] The plaintiff may then show that the defendant's reasons were a pretext for statutorily prohibited discrimination.[39] The ultimate burden of persuasion remains with the plaintiff throughout the disparate treatment pretext analysis.[40]

Shifting the burdens of production insures that a plaintiff has the opportunity to show the defendant's discriminatory intent even though he has no direct evidence of it.[41] Hence, the shifting burdens do not apply when a plaintiff presents direct evidence of the defendant's illegal discrimination.[42] In the face of direct evidence of its discriminatory intent, the defendant has the burden of proving an affirmative bfoq defense for its challenged policy or action.[43]

The second major theory of recovery under title VII, disparate impact, also involves apparently neutral employment practices and

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35. Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1547 (11th Cir. 1984); Williams, *supra* note 23, at 668; Note, *supra* note 23, at 107.

36. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). *McDonnell Douglas* was a failure to rehire case. In Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), the Court applied the *McDonnell Douglas* analysis to a discharge case and further refined the allocations of proof.

37. *Burdine*, 450 U.S. at 252-54.

38. *McDonnell Douglas*, 411 U.S. at 802; *Burdine*, 450 U.S. at 253. When the plaintiff has met her initial burden, a presumption is created. The burden which shifts to the defendant is that of rebutting the presumption by coming forward with enough evidence to create a genuine issue of fact regarding whether it discriminated against the plaintiff. The defendant does not have to persuade the court that the articulated reason(s) actually motivated it. *Burdine*, 450 U.S. at 254-55.

39. *McDonnell Douglas*, 411 U.S. at 804; *Burdine*, 450 U.S. at 253.

40. *Burdine*, 450 U.S. at 253, 256.

41. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (citing Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979)). *See also Burdine*, 450 U.S. 255-56 (shifting burdens clarifies the factual issue so that "plaintiff will have a full and fair opportunity to demonstrate pretext.").

42. *Thurston*, 469 U.S. at 121 (citing International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977)); *see also* Carney v. Martin Luther Home, Inc., 824 F.2d 643, 648 (1987) and B. SCHLEI & P. GROSSMAN (Supp. 1985), *supra* note 21, at 301.

Thurston involved an action brought under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-34 (1982). In Lorillard v. Pons, 434 U.S. 575, 584 (1978) the Court found that the substantive provisions of the ADEA "were derived *in haec verba* from Title VII." *Id.*

43. *Thurston*, 469 U.S. at 121; *Carney*, 824 F.2d at 648 and 1 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION: SEX § 12.11 at 3-24 (1987) [hereinafter 1 A. LARSON & L. LARSON].

shifting burdens of producing evidence.[44] Again, the analysis has three parts.[45] However, analysis here focuses on the impact or consequences of the challenged practice rather than the defendant's motives for it.[46] The plaintiff has the initial burden of establishing a prima facie case of adverse impact.[47] Once adverse impact is established, the burden shifts to the defendant to show that the practice is justified as job-related or as a business necessity.[48] If business necessity is established, the plaintiff has the burden to show the existence of alternative practices which would serve the defendant's needs with a less discriminatory impact.[49]

At the stage of the disparate impact theory in which the burden of proof shifts to the defendant, the Court created the business necessity defense.[50] Because business necessity is a defense, the defendant bears a heavy burden of production at this stage of the analysis.[51]

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44. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

45. Connecticut v. Teal, 457 U.S. 440, 446-47 (1982); *Moody*, 422 U.S. at 425.

Schlei & Grossman emphasize that "the *Griggs/Albemarle* formula is an analytical tool for evaluating evidence and not a three-step procedure by which evidence is presented. Thus, in considering whether or not one side or the other has satisfied its burden at particular steps, the court will consider evidence relevant to that step offered by both plaintiff and defendant." B. SCHLEI & P. GROSSMAN (2d ed. 1983), *supra* note 19, at 1325.

The same is also true of the three-part formula for disparate treatment analysis. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978); B. SCHLEI & P. GROSSMAN (2d ed. 1983), *supra* note 19, at 1321.

46. *Teamsters*, 431 U.S. at 335-36 n.15; *see also Griggs*, 401 U.S. at 432 ("Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.").

47. *Dothard*, 433 U.S. at 329; *Moody*, 422 U.S. at 425; *Griggs*, 401 U.S. at 432.

48. *Dothard*, 433 U.S. at 329; *Moody*, 422 U.S. at 425; *Griggs*, 401 U.S. at 431 ("[T]he touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."). *See also* Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 815 (8th Cir. 1983) (citing *Griggs*, 401 U.S. at 431).

49. *Dothard*, 433 U.S. at 329; *Moody*, 422 U.S. at 425.

50. The *Griggs* Court, and other courts since, have used the terms business necessity and job-related interchangeably. B. SCHLEI & P. GROSSMAN (2d ed. 1983), *supra* note 19, at 1329.

Furthermore, courts have defined business necessity in several ways. The Court in *Dothard*, 433 U.S. at 331 n.14 found that "a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge," must be "essential to effective job performance," and "essential to good job performance." *Id.* In *Griggs*, 401 U.S. at 432, the Court held that the employer must show the challenged job requirement had a "manifest relationship to the employment in question" and found that the employer had not shown that the challenged job requirement bore "a demonstrable relationship to successful performance of the jobs for which it was used." *Id.* In Kirby v. Colony Furniture Co., 613 F.2d 696, 705 n.6 (8th Cir. 1980), the Eighth Circuit found "the proper standard is . . . whether there is a *compelling* need for the employer to maintain that practice and whether the employer can prove there is *no* alternative to the challenged practice." *Id.*

51. Hawkins v. Anheuser-Busch, Inc., 697 F.2d at 815 (quoting *Dothard*, 433 U.S. at 329)

With respect to proof at this stage, the Court has required the employer to show job-relatedness by use of validation studies when the challenged practice is a scored test or requirement of a high school diploma.[52] However, when the challenged practice involves other objective job criteria for professional or highly skilled jobs, lower courts have not insisted upon validation studies to show the job-relatedness of the criteria.[53] Even so, the proof must consist of more than the conclusory testimony of the defendant's employees.[54]

Courts have analyzed cases involving discrimination on the basis of pregnancy under both of the major title VII theories of recovery.[55] Consistent with Equal Employment Opportunity Commission (EEOC) guidelines,[56] lower federal courts in the early 1970s found

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(The defendant must demonstrate that the job requirement had "a manifest relationship to the employment in question."); *Hawkins*, 697 F.2d at 815 (quoting Kirby v. Colony Furniture, 613 F.2d 696, 706 n.6 (8th Cir. 1980)) ("A discriminatory employment practice cannot be 'justified by routine business considerations;' the employer must demonstrate that there is a '*compelling* need . . . to maintain that practice.' "). *See also* B. SCHLEI & P. GROSSMAN (2d ed. 1983), *supra* note 19, at 1328.

The evidentiary burden in the second part of the disparate impact analysis is greater than it is in the second part of disparate treatment pretext analysis. *See, e.g.*, Williams v. Colorado Springs School Dist., 641 F.2d 835, 842 (10th Cir. 1981) ("[I]n a disparate impact case, unlike a disparate treatment case, a rational or legitimate, nondiscriminatory reason is insufficient. The practice must be essential, the purpose compelling.").

The question of whether the defendant's burden is a burden of persuasion or simply one of producing evidence is open. Until recently, the Court had cast the burden of persuasion upon the defendant. *See, e.g.*, *Moody*, 422 U.S. at 425 (defendant must "meet the burden of proving that its tests are 'job-related' "); *Dothard*, 433 U.S. at 329 (defendant must "prov[e] that the challenged requirements are job related"). However, the Court's recent plurality decision creates doubt as to what burden future defendants will carry—persuasion or production. Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777, 2790 (1988) ("[T]he ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times.").

52. *Griggs*, 401 U.S. at 431 (job requirements adopted "without meaningful study of their relationship to job-performance ability"); *Moody*, 422 U.S. at 425, 431-32 (employer's validation studies inadequate when measured against guidelines for validation studies issued by the Equal Employment Opportunity Commission (EEOC)). *See also*, 3 A. LARSON & L. LARSON, *supra* note 20, at § 72.10, 14-5 to 14-6 (issue of business necessity in testing cases almost exclusively an inquiry whether tests have been adequately validated for job-relatedness).

53. *See, e.g.*, *Hawkins*, 697 F.2d at 815-16 (validation study not required to show job-relatedness of college degree to trade returns supervisor job); Spurlock v. United Airlines, Inc., 475 F.2d 216, 218-19 (10th Cir. 1972) (job-relatedness of requirement of 500 flight hours established by statistics showing applicants with higher flight hours more likely to succeed in pilot training program).

54. *Hawkins*, 697 F.2d at 815 (lengthy testimony by company personnel concerning why college degree requirement was job-related showed business necessity).

55. Wald, *Judicial Construction of the 1978 Pregnancy Discrimination Amendment to Title VII: Ignoring Congressional Intent*, 31 AM. U.L. REV. 591, 595-97 (1982).

56. 29 C.F.R. § 1604.10 (1973). EEOC guidelines issued in 1972 declared that pregnancy constitutes a temporary disability for all employment purposes. After Congress passed the

that employment discrimination on the basis of pregnancy constituted disparate treatment and was prohibited by title VII.[57] However, in 1976 the Supreme Court applied the disparate impact theory in *General Electric Company v. Gilbert*[58] to uphold an employer's disability benefits plan which excluded pregnancy but paid benefits for other nonoccupational disabilities. The Court held that pregnancy-based differentiation was not sex discrimination because it produced categories of pregnant and nonpregnant persons. The nonpregnant category included both men and women.[59] Analyzing the challenged policy as a facially neutral one, the Court found that the female plaintiffs had not shown the gender-based effects necessary to make out a prima facie case under the disparate treatment theory.[60]

In response to the Court's decision in *Gilbert*, Congress passed the Pregnancy Discrimination Act of 1978 (PDA).[61] The PDA amended title VII to specifically include pregnancy discrimination in the definition of discrimination on the basis of sex.[62] The House Labor and Education Committee specifically approved the EEOC guidelines, which the majority of the Court had rejected.[63] The Committee stated that the Act clarified Congress' original intent "to ensure that working women are protected against all forms of employment dis-

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Pregnancy Discrimination Act, the EEOC issued new guidelines which are almost identical to the earlier ones. 29 C.F.R. § 1604.10 (1986) provides, in part, that a written or unwritten employment policy or practice which excludes applicants because of pregnancy is a prima facie violation of title VII. Furthermore, disability insurance, sick leave, leave duration, seniority, and reinstatement must apply to pregnancy on the same terms as they are applied to other disabilities.

57. Eighteen federal district courts and seven federal courts of appeals had rendered decisions prohibiting discrimination in employment based on pregnancy before 1976. H.R. REP. NO. 948, 95th Cong., 2d Sess. 2, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4749, 4750 [hereinafter HOUSE REPORT].

58. 429 U.S. 125 (1976).

59. *Id.* at 133-34.

60. *Id.* at 137.

61. HOUSE REPORT, *supra* note 57, at 2-5, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS at 4750-53.

62. The Pregnancy Discrimination Act, Pub. L. No. 95-55, § 1, 92 Stat. 2076 (1977) (codified at 42 U.S.C. § 2000e(k) (1982)) [hereinafter PDA].

The PDA provides:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .

63. HOUSE REPORT, *supra* note 57, at 2, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS at 4750.

crimination based on sex."[64] Congress' original intent was also to prevent discrimination against women in employment "based on stereotyped characterizations of the sexes."[65]

After Congress passed the PDA, the Supreme Court held the Act "made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex."[66] Because discrimination on the basis of pregnancy is now facial discrimination, the burden of proof shifts to the employer to show that such discrimination is justified as a bfoq in the circumstances of the particular employment at issue.[67] Since passage of the PDA, courts have considered nonpregnancy as a bfoq in the circumstances of the employment of airline flight attendants and of workers in environments which may be hazardous to fetuses. In both circumstances, employers seek to justify exclusion of pregnant workers on the basis of safety concerns.

In *Levin v. Delta Air Lines, Inc.*[68] the United States Court of Appeals for the Fifth Circuit found that concerns for passenger safety in emergency situations justified the exclusion of pregnant workers from the job of flight attendant. The court held that a discriminatory policy must address the essence of an employer's business to be justified as a bfoq.[69] It found that passenger safety was the essence of the defendant airline's business because of its commitment to safety.[70] Testimony of medical experts established that pregnant women are subject to pregnancy-related ailments which can render them unable to perform routine safety duties in emergencies.[71] The court acknowledged that many pregnant women do not suffer such disabilities. Nevertheless, it found that the impossibility of predicting which women will suffer pregnancy-related disabilities and the magnitude of

64. *Id.* at 3, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS at 4751.

65. Phillips v. Martin Marietta Corp., 400 U.S. 542, 545, 546 n.3 (1971) (Marshall, J., concurring) (quoting EEOC Guideline now codified at 29 C.F.R. § 1604.2(a)(1)(ii) (1988)).

66. Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 684 (1983).

67. 1 A. LARSON & L. LARSON, *supra* note 43, at 3-22.

68. Levin v. Delta Air Lines, Inc., 730 F.2d 994 (1984). *See also* Harriss v. Pan Am. World Airways, Inc., 649 F.2d 670, 677 (1980) (finding that, after Congress passed PDA, airline policy excluding pregnant women from flight attendant work was justified as a bfoq because of the significant safety risk to passengers).

69. *Levin*, 730 F.2d at 997.

70. *Id.* at 999.

71. *Id.* at 997. Defendant's medical experts testified that pregnant women are subject to spontaneous abortion, nausea, and fatigue. Plaintiff's experts did not dispute that these ailments could impair the ability of a pregnant attendant to perform safety duties but argued that the likelihood of a pregnant flight attendant being incapacitated at the same time that an emergency occurred was infinitesimally small. *Id.*

the risk to passengers justified excluding all pregnant attendants from flight duties.[72]

Employers have also advanced concerns for the safety of the unborn child of pregnant workers as justification for excluding pregnant employees from certain jobs.[73] The United States Court of Appeals for the Eleventh Circuit set out a framework for analysis of fetal protection cases in *Hayes v. Shelby Memorial Hospital.*[74] The court began its analysis by establishing a rebuttable presumption that fetal protection policies which apply only to women are facially discriminatory.[75] To rebut the presumption, the court required that a defendant must produce objective scientific evidence supported by opinion evidence of experts in the relevant scientific fields to prove there is a substantial risk of harm to the fetus.[76] If the defendant does not rebut the presumption of facial discrimination, its only defense is a bfoq. The court held that there is no defense to a facially discriminatory fetal protection policy "unless the employer shows a direct relationship between the policy and the actual ability of a pregnant or fertile female to perform her job."[77]

When an employer discriminates against a female employee because she is unmarried as well as pregnant, the analysis remains the same. Although title VII does not prohibit discrimination on the basis of marital status, when marital status is combined with pregnancy

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72. *Id.* at 998.

73. *See, e.g.*, Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982); Zuniga v. Kleberg County Hosp., 692 F.2d 986 (5th Cir. 1982).

74. 726 F.2d 1543 (5th Cir. 1984). *See also* EEOC Compliance Manual (CCH) ¶ 4318 (Oct. 7, 1988) (setting forth an analytical framework based on *Hayes* and *Wright* for determining when exclusionary fetal protection policies violate title VII).

75. *Id.* at 1548.

76. *Id.* If the defendant carries the threshold burden of proving significant risk of harm to the fetus, it must then prove, also with scientific evidence, that the risk does not also apply to the offspring of male employees. When scientific evidence concerning the risk to men does not exist, an employer may adopt a suitable policy aimed only at women. *Id.* at 1548-49.

A defendant which successfully rebuts the initial presumption of facial discrimination has, in effect, proven its fetal protection policy is neutral because it protects equally the offspring of both men and women employees. However, the policy has a disparate impact on women because it affects only them. Therefore, the plaintiff has an automatic prima facie case of disparate impact for which the defendant is entitled to assert a business necessity defense. Under traditional title VII analysis, the employer must prove business necessity by showing its policy is related to job performance. Because a fetal protection policy has nothing to do with job performance, the employer in such a case would not be able to make the required showing. For public policy reasons, the *Hayes* court held that employers in fetal protection cases will be allowed the business necessity defense. Its defense is automatic in such a situation because the employer has already proved, to rebut the presumption of facial discrimination, that its policy is justified on a scientific basis and addresses a harm that affects only women. *Id.* at 1552-53.

77. *Id.* at 1549.

as the basis for the discrimination, courts have held that the combination violates title VII.[78] Unwed pregnancy has been the basis for discrimination in several cases involving teachers or counselors.[79] Two of these cases involved public school defendants and were, therefore, decided under the Constitution.[80] In these cases, the schools offered role modeling as justification for their discriminatory actions against the unmarried pregnant teachers.[81] The courts rejected the role model defense under equal protection analysis.[82]

In a third public school case, *Ponton v. Newport News School Board*,[83] the plaintiff teacher brought her case under title VII, as well as the Constitution. The defendant had forced the plaintiff to take leave after it learned she was pregnant but unmarried. It did not hold her position for her, but allowed her to return two years later when another position for which she was qualified became available.[84] The court first decided the plaintiff's constitutional claim, weighing her right to privacy against the public employer's asserted interest in "protecting schoolchildren from exposure to a single, pregnant teacher."[85] Without referring to any evidence presented, the court found that students' knowledge that plaintiff was unmarried would have "a fairly minimal impact on them."[86] The court further found

78. *See, e.g.*, Jacobs v. Martin Sweets Co., 550 F.2d 364 (6th Cir.), *cert. denied*, 431 U.S. 917 (1977) (executive secretary demoted to a clerical position because of her out-of-wedlock pregnancy, and was effectively discharged on the basis of a classification which had no rational relationship to business necessity); Doe v. Osteopathic Hosp., 333 F. Supp. 1357 (D. Kan. 1971) (because unwed pregnancy did not adversely affect her job performance, hospital business office worker's discharge for her failure to notify the employer of her condition violated title VII).

79. Avery v. Homewood City Bd. of Educ., 674 F.2d 337 (5th Cir. 1982); Andrews v. Drew Mun. Separate School Dist., 507 F.2d 611 (5th Cir. 1975); Ponton v. Newport News School Bd., 632 F. Supp. 1056 (E.D. Va. 1986).

80. *Avery*, 674 F.2d 337; *Andrews*, 507 F.2d 611.

81. *Avery*, 674 F.2d at 341; *Andrews*, 507 F.2d at 614.

82. *Avery*, 674 F.2d at 341 (asserted role model defense violated rights under equal protection clause of fourteenth amendment for the same reasons as the court rejected the defense in *Andrews*); *Andrews*, 507 F.2d at 616 (quoting Andrews v. Drew Mun. Separate School Dist., 371 F. Supp. 27, 35 (1973)) (role model defense violated equal protection clause of the fourteenth amendment because "the likelihood of inferred learning that unwed parenthood is necessarily good or praiseworthy, is highly improbable, if not speculative").

83. 632 F. Supp. 1056 (E.D. Va. 1986).

84. *Id.* at 1059-60. Married pregnant teachers were given the option of taking a disability leave which allowed them to work until they were physically unable to do so and guaranteed them their former jobs when they returned. *Id.* at 1059. The school district contended the plaintiff elected to take parental leave rather than disability leave. *Id.* at 1060. However, the court found the preponderance of the evidence showed she was forced to take immediate, indefinite leave because she was single and pregnant. *Id.* at 1060-61.

85. *Id.* at 1062.

86. *Id.* at 1063.

there was no danger that the plaintiff's single, pregnant status could be perceived as representing the school board's advocacy of unwed pregnancy.[87] Hence, the court held that the school district violated plaintiff's right to privacy when it forced her to take leave because the state interest asserted did not outweigh her constitutional right of privacy.[88]

As for her title VII claim, the court found the plaintiff had proved a prima facie case of sex discrimination by showing she was forced to take leave because she was pregnant.[89] The court found the defendant had forced the plaintiff to take leave early in her pregnancy because it was concerned that her teaching while she was pregnant and unmarried "would have been a bad moral example for her students."[90] The court pointed out that, in deciding the constitutional claim, it had already discussed why this was not a legitimate concern.[91] The court then held that, because the discrimination was based upon pregnancy and a constitutionally protected right, it violated title VII.[92]

The courts have decided, under title VII, only two cases involving discrimination by private educational institutions on the basis of unwed pregnancy. The first such case was *Dolter v. Wahlert High School*,[93] in which a Catholic school refused to renew the contract of an unmarried English teacher after she became pregnant. The defendant moved for summary judgment or dismissal on two grounds, one of which was its right under section 2000e-2(e)(2) of title VII to impose upon its teachers a code of moral conduct consistent with recognized moral precepts of the Catholic church.[94] The court acknowledged that a religious employer has such a right as a bfoq defense for religious discrimination.[95] However, if it imposes the moral code upon one sex only, it violates title VII on the basis of sex discrimination.[96] The court found that the defendant's contentions concerning a bfoq defense did not relate to plaintiff's failure to state or support a sex discrimination claim, but to the parties' respective burdens of

87. *Id.*
88. *Id.*
89. *Id.* at 1065.
90. *Id.*
91. *Id.*
92. *Id.*
93. 483 F. Supp. 266 (N.D. Iowa 1980).
94. 42 U.S.C. § 2000e-2(e)(2) (1982) provides that it is not unlawful discrimination for a religious educational institution to employ only persons of a particular religion.
95. *Dolter*, 483 F. Supp. at 270-71.
96. *Id.* at 271.

proof under disparate treatment analysis.[97] The plaintiff submitted an affidavit asserting that other employees, known to have violated the defendant's moral code by engaging in premarital sex, were not discharged.[98] Her affidavit created a question of fact concerning the crucial issue of whether the defendant's religious bfoq was a pretext for sex discrimination. Therefore, the court denied the defendant's motion for dismissal or summary judgment.[99]

The second case involving a private institution defendant and discrimination on the basis of unwed pregnancy is *Harvey v. Young Women's Christian Association*.[100] In *Harvey*, the single female plaintiff was a program director who developed and implemented various programs among teenage girls in a community-based project away from the defendant's facility.[101] When hired, she signed an agreement that she would uphold the defendant's Christian principles and philosophy.[102] After learning that she was pregnant out of wedlock, the plaintiff met with her supervisor to discuss the matter. She told her supervisor that she could offer herself in her unmarried, pregnant condition as a role model of an alternative lifestyle.[103] After this discussion, the defendant asked her to resign.[104]

The court found the plaintiff had proved a prima facie case of sex discrimination by her testimony that she was discharged because of pregnancy.[105] However, the testimony of three of defendant's officials established that she was discharged because of her expressed intent to represent to the teenagers, with whom she worked, a lifestyle that was contrary to the defendant's principles and, therefore, violated her hiring agreement.[106] Thus, the defendant rebutted plaintiff's prima facie case by showing it had a legitimate, nondiscriminatory reason for discharging her.[107] Finally, the court found that the plaintiff had not met her burden of proving that the defendant's reasons for discharging her were a pretext.[108]

At the trial level of the present case, *Chambers v. Omaha Girls*

97. *Id.*
98. *Id.*
99. *Id.* at 271-72.
100. 533 F. Supp. 949 (W.D.N.C. 1982).
101. *Id.* at 951.
102. *Id.* at 950-51.
103. *Id.* at 952.
104. *Id.*
105. *Id.* at 954.
106. *Id.* at 954-55.
107. *Id.* at 954.
108. *Id.* at 956.

Club, Inc.,[109] the district court relied upon *Harvey* in finding that the OGC had shown its role model rule was a business necessity under the disparate impact theory.[110] The court found that teenage pregnancy was contrary to the OGC's purpose of providing young girls with "exposure to the greatest number of available positive options in life."[111] It found that OGC had established its honest belief that allowing single pregnant staff members to work with its members would convey the impression that it approved of teenage pregnancy.[112]

The district court also analyzed the case under the disparate treatment theory.[113] It found the defendant had articulated a legitimate, nondiscriminatory reason for its role model rule, attempting to discourage teenage pregnancy.[114] The court's conclusions were based upon numerous preliminary findings of fact.[115] These findings included: 1) the OGC was engaged in a program of pregnancy prevention for at least five years; 2) the rule was adopted after two single staff members became pregnant; 3) two club members reacted to the pregnancies; and 4) the plaintiff was fired only because she was pregnant.[116] The court also noted the conflicting evidence of the parties' expert witnesses. The plaintiff's expert testified that economic factors are the primary reason for teenage pregnancy and only education can resolve the problem. The defendant's expert agreed, but, testified that in her opinion, role modeling could be another way to attack the problem.[117]

The United States Court of Appeals for the Eighth Circuit reviewed the lower court's business necessity determination under the clearly erroneous standard of review.[118] In so doing, it quoted the lower court's findings of fact regarding business necessity. It also noted that the lower court had relied upon the defendant's expert testimony "to the effect that the role model rule could be helpful in preventing teenage pregnancy."[119]

Chambers argued that the district court's business necessity finding was clearly erroneous because the role model rule was based solely

109. 629 F. Supp. 925 (D. Neb. 1986), *aff'd*, 834 F.2d 697 (8th Cir. 1987).
110. 629 F. Supp. at 950.
111. *Id.*
112. *Id.*
113. *Id.* at 946-48.
114. *Id.* at 947.
115. *Id.* at 945-46.
116. *Id.*
117. *Id.* at 951.
118. *Chambers*, 834 F.2d at 702. *See supra* note 15.
119. *Chambers*, 834 F.2d at 702.

on OGC's speculation and had not been validated by any studies showing its relationship to the purpose of preventing teenage pregnancies. In response, the court stated that validation studies are not required to maintain a successful business necessity defense.[120]

Chambers also argued that the lower court's conclusion that there were no less discriminatory alternatives was clearly erroneous. The appeals court disagreed, noting that a leave for the purpose of keeping Chambers out of contact with members while she was visibly pregnant would be much longer than the OGC's customary leaves of up to six weeks.[121]

The United States Court of Appeals for the Eighth Circuit next reviewed the lower court's findings under the disparate treatment/ bfoq theory. The court reasoned that, if the same standard, "manifest relationship,"[122] applied to both the business necessity and bfoq defenses, then the lower court's findings with respect to one would apply to the other. Having already concluded that the finding of business necessity was not clearly erroneous, the court felt compelled to hold that the role model rule was also a bfoq.[123]

Judge McMillian dissented,[124] pointing out that the district court and the majority accepted, without any supporting empirical evidence, the defendant's assumption that the presence of unwed pregnant instructors was related to teenage pregnancies.[125] The dissent supported its position by citing three public school cases rejecting the role model defense as speculative.[126] Finally, the dissent argued that,

120. *Id.* (citing Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 815-16 (8th Cir. 1983)).

121. *Id.* at 703.

122. *Id.* at 704.

123. *Id.* at 704-05.

124. *Id.* at 705-09 (McMillian, J., dissenting).

125. The dissent pointed out that the district court relied upon "questionable anecdotal incidents" to support the rule. *Id.* at 707.

The district court had found that:

> The rule was also adopted in response to the reaction of a fourteen year old Girls Club member (Sheila Brown) stating that she wanted to have a baby as cute as Marchese (Melanie Well's baby) and that shortly thereafter Ms. Brown did become pregnant. And, the rule was adopted in response to the reaction of another member, Sue Miller, who became upset when she learned of Ms. Price's pregnancy . . . .

Chambers, 629 F. Supp. at 945.

Chambers rebutted these incidents with the testimony of Sheila Brown and her mother that Sheila's pregnancy accidentally resulted from relations with her steady boyfriend and was altogether unintended. Brief for Appellants at 7, Chambers v. Omaha Girls Club, 834 F.2d 697 (8th Cir. 1987) (No. 86-1447).

126. *Chambers*, 834 F.2d at 707-08 (citing Avery v. Homewood City Bd. of Educ., 674 F.2d 337 (5th Cir. 1982); Andrews v. Drew Mun. Separate School Dist., 507 F.2d 611 (5th Cir. 1975); Ponton v. Newport News School Bd., 632 F. Supp. 1056 (E.D. Va. 1986)).

even if OGC had proved a defense, it still could not prevail because Chambers had shown there was a less discriminatory alternative. The OGC's personnel policy provided pregnancy and illness leaves up to six weeks and longer leaves upon approval of the board.[127]

The same judge dissented, along with two others, from the denial of Chambers' request for a rehearing *en banc*.[128] They emphasized that the bfoq defense should be limited to the pregnant worker's ability to perform the duties of her job.[129] Otherwise, there is no way to insure that pregnant workers will be treated the same as other employees "not so affected but similar in their ability or inability to work."[130]

The *Chambers* decision illustrates the need for clear guidelines for the application of the supposedly narrow bfoq defense to claims of sex discrimination. Despite the fact that Congress has clearly stated that title VII prohibits discrimination on the basis of pregnancy,[131] the court found that role modeling justifies firing an unwed pregnant worker. This finding was based on nothing more than the defendant's beliefs, the unsupported opinion of the defendant's expert, and two anecdotes.[132] The Supreme Court set the precedent for such a result when it sought to narrow the application of the bfoq defense by the circumstances of the employment rather than adhering to the lower courts' requirement of a factual basis showing that substantially all women are unable to perform the work at issue.[133] The "circumstance" standard allows the exclusion of women from employment on the basis of stereotypes about them. The experts' opinions in *Dothard*[134] were based upon the unsupported assumption that women are more vulnerable to sexual assault than men.[135] Whether or not the court acknowledges it, implicit in the role modeling bfoq is the assumption that unwed pregnant women are immoral.[136] As long as the courts are willing to base decisions on unsupported opinions, Congress' intent that women not be excluded from employment on the basis of stereotypes about them will be thwarted.[137] To avoid this

127. *Chambers*, 834 F.2d at 708-09.
128. Chambers v. Omaha Girls Club, 840 F.2d 583 (8th Cir. 1988) (Lay, C.J., dissenting).
129. *Id.* at 585-86.
130. *Id.* at 586.
131. *See supra* notes 61-65 and accompanying text.
132. *See supra* notes 112, 119, 125 and accompanying text.
133. *See supra* note 30 and accompanying text.
134. *Dothard*, 433 U.S. 321, 336 (1977).
135. *See* Note, *supra* note 30, at 134 n.229.
136. *See supra* text accompanying notes 80-93.
137. *See supra* text accompanying note 65.

result, courts should require demonstrable proof of the justification for sex discrimination.[138] Otherwise, it is time for Congress to further clarify that discrimination on the basis of sex includes unmarried as well as married women.

Judith Elane

138. *See supra* note 76 and accompanying text.